

1 ANTHONY L. FRANÇOIS, No. 184100
afrancois@pacificlegal.org
2 CHARLES T. YATES, No. 327704
cyates@pacificlegal.org
3 Pacific Legal Foundation
930 G Street
4 Sacramento, California 95814
Telephone: (916) 419-7111
5 Facsimile: (916) 419-7747

6 Attorneys for Proposed Defendant-Intervenors
Chantell and Michael Sackett
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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 STATE OF CALIFORNIA, et al.,

12 Plaintiffs,

13 v.

14 ANDREW R. WHEELER, as Administrator of the
15 U.S. Environmental Protection Agency, et al.,

16 Defendants,

17 and

18 CHANTELL and MICHAEL SACKETT,

19 Defendant-Intervenors.
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No. 3:20-cv-03005-RS

**[PROPOSED] ANSWER OF
DEFENDANT-INTERVENORS
CHANTELL AND MICHAEL
SACKETT**

Judge: Honorable Richard Seeborg

1 For their answer to the complaint of State of California by and through Attorney General
2 Xavier Becerra and California State Water Resources Control Board, State of New York, State of
3 Connecticut, State of Illinois, State of Maine, State of Maryland, State of Michigan, State of New
4 Jersey, State of New Mexico, State of North Carolina ex rel. Attorney General Joshua H. Stein,
5 State of Oregon, State of Rhode Island, State of Vermont, State of Washington, State of Wisconsin,
6 Commonwealths of Massachusetts and Virginia, the North Carolina Department of Environmental
7 Quality, the District of Columbia, and the City of New York (collectively “State Plaintiffs”),
8 Defendant-Intervenors Chantell Sackett and Michael Sackett (“The Sacketts”) admit, deny, and
9 allege as follows:

10 INTRODUCTION

11 1. The Sacketts admit the allegations in paragraph 1 to the extent that those named are
12 the parties to this lawsuit.

13 2. The allegations in paragraph 2 purport to characterize the Navigable Waters
14 Protection Rule: Definition of “Waters of the United States” (2020 Rule), which speaks for itself
15 and is the best evidence of its contents. Any allegations contrary to the plain language and meaning
16 of the 2020 Rule are denied.

17 3. The allegations in paragraph 3 purport to characterize the 2020 Rule and the Clean
18 Water Act which speak for themselves and are the best evidence of their contents. Any allegations
19 contrary to the plain language and meaning of these documents are denied. The allegations in
20 paragraph 3 also contain conclusions of law to which no answer is required; to the extent they may
21 be deemed allegations of fact, they are denied.

22 4. The allegations in paragraph 4 purport to characterize the 2020 Rule and the 2015
23 “Clean Water Rule,” which speak for themselves and are the best evidence of their contents. Any
24 allegations contrary to the plain language and meaning of these Rules are denied.

25 5. The allegations in paragraph 5 purport to characterize the 2019 Rule, which speaks
26 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
27 meaning of the 2019 Rule are denied.

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INTRADISTRICT ASSIGNMENT

15. The allegations in paragraph 15 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

PARTIES

16. The Sacketts admit the allegations in the first, third, and fifth sentences of paragraph 16. The allegations in the fourth sentence paragraph 16 purport to characterize 33 U.S.C. § 1362(3), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the remainder of paragraph 16, and on that basis deny the same

17. The Sacketts admit the allegations in paragraph 17.

18. The allegations in paragraph 18 constitute conclusions of law to which no answer is required.

19. The Sacketts admit the allegations in paragraph 19.

20. The allegations in paragraph 20 constitute conclusions of law to which no answer is required.

STATUTORY AND REGULATORY FRAMEWORK

The Administrative Procedure Act

21. The allegations in paragraph 21 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

22. The allegations in paragraph 22 purport to characterize 5 U.S.C. § 551(5), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied.

23. The allegations in paragraph 23 purport to characterize the APA and 5 U.S.C. § 553(b), (c), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

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1 24. The allegations in paragraph 24 purport to characterize 5 U.S.C. § 553(c), which
2 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
3 language and meaning of this provision are denied.

4 25. The allegations in paragraph 25 purport to characterize 5 U.S.C. § 553(c), which
5 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
6 language and meaning of this provision are denied. The allegations in paragraph 25 also contain
7 conclusions of law, to which no answer is required; to the extent they may be deemed allegations
8 of fact, they are denied.

9 26. The allegations in paragraph 26 constitute conclusions of law and Plaintiffs'
10 characterization of the APA, to which no answer is required; to the extent they may be deemed
11 allegations of fact, they are denied.

12 27. The allegations in paragraph 27 constitute conclusions of law and Plaintiffs'
13 characterization of the APA, to which no answer is required; to the extent they may be deemed
14 allegations of fact, they are denied.

15 28. The allegations in paragraph 28 constitute conclusions of law and Plaintiffs'
16 characterization of the APA, to which no answer is required; to the extent they may be deemed
17 allegations of fact, they are denied.

18 29. The allegations in paragraph 29 purport to characterize 5 U.S.C. § 706(2)(A), which
19 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
20 language and meaning of this provision are denied. The allegations in paragraph 29 also contain
21 conclusions of law, to which no answer is required; to the extent they may be deemed allegations
22 of fact, they are denied.

23 **The Clean Water Act**

24 30. The allegations in paragraph 30 purport to characterize the Clean Water Act and 33
25 U.S.C. § 1251(a), which speak for themselves and are the best evidence of their contents. Any
26 allegations contrary to the plain language and meaning of these provisions are denied.

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1 31. The allegations in paragraph 31 purport to characterize 33 U.S.C. §§ 1311(a), 1342,
2 1344, and 1362(7), (12), which speak for themselves and are the best evidence of their contents.
3 Any allegations contrary to the plain language and meaning of these provisions are denied.

4 32. The allegations in paragraph 32 constitute conclusions of law to which no answer is
5 required; to the extent they may be deemed allegations of fact, they are denied.

6 33. The allegations in paragraph 33 purport to characterize the Clean Water Act, S. Rep.
7 No. 92-414 at 77 (1972), and 33 U.S.C. §§ 1311, 1342, and 1344, which speak for themselves and
8 are the best evidence of their contents. Any allegations contrary to the plain language and meaning
9 of these documents are denied.

10 34. The allegations in paragraph 34 purport to characterize the Clean Water Act and 33
11 U.S.C. § 1344 (a), (h), which speak for themselves and are the best evidence of their contents. Any
12 allegations contrary to the plain language and meaning of these documents are denied.

13 35. The allegations in paragraph 35 purport to characterize the Clean Water Act, and 33
14 U.S.C. §§ 1342(a), (b), which speak for themselves and are the best evidence of their contents. Any
15 allegations contrary to the plain language and meaning of these provisions are denied.

16 36. The allegations in paragraph 36 purport to characterize 33 U.S.C. § 1342(d), which
17 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
18 language and meaning of this provision are denied.

19 37. The allegations in paragraph 37 purport to characterize 33 U.S.C. § 1313, which
20 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
21 language and meaning of this provision are denied.

22 38. The allegations in paragraph 38 purport to characterize 33 U.S.C. § 1341(a)(1), (2),
23 which speak for themselves and are the best evidence of their contents. Any allegations contrary to
24 the plain language and meaning of these provisions are denied.

25 39. The allegations in paragraph 39 purport to characterize the Clean Water Act and 33
26 U.S.C. §§ 1321(b), (j)(5), (s), which speak for themselves and are the best evidence of their
27 contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

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1 The allegations in paragraph 39 also contain conclusions of law to which no answer is required; to
2 the extent they may be deemed allegations of fact, they are denied.

3 40. The allegations in the first sentence of paragraph 40 purport to characterize the
4 Clean Water Act, and 33 U.S.C. § 1370(1), which speak for themselves and are the best evidence
5 of their contents. Any allegations contrary to the plain language and meaning of these provisions
6 are denied. The Sacketts lack information sufficient to form a belief as to the truth of the remaining
7 allegations in paragraph 40, and on that basis deny the same. The remaining allegations in paragraph
8 40 also contain conclusions of law to which no answer is required.

9 **Agency Regulations and Guidance Defining “Waters of the United States”**

10 41. The allegations in paragraph 41 purport to characterize 42 Fed. Reg. 37, 144 (July
11 19, 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980); 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg.
12 41,206 (Nov. 13, 1986); and 53 Fed. Reg. 20,764 (June 6, 1988) (the 1980s Regulations), which
13 speak for themselves and are the best evidence of their contents. Any allegations contrary to the
14 plain language and meaning of these documents are denied.

15 42. The allegations in paragraph 42 purport to characterize the 2003 *SWANCC*
16 Guidance, which speaks for itself and is the best evidence of its contents. Any allegations contrary
17 to the plain language and meaning of this document are denied.

18 43. The allegations in paragraph 43 purport to characterize the 2008 *Rapanos* Guidance,
19 which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
20 language and meaning of this document are denied.

21 44. The allegations in paragraph 44 purport to characterize the 2008 *Rapanos* Guidance,
22 which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
23 language and meaning of this document are denied.

24 45. The allegations in paragraph 45 purport to characterize 80 Fed. Reg. at 37,054 and
25 82 Fed. Reg. 34,899, 34,901. Which speak for themselves and are the best evidence of their
26 contents. Any allegations contrary to the plain language and meaning of these documents are
27 denied.

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1 46. The allegations in paragraph 46 purport to characterize the 2015 Rule, which speaks
2 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
3 meaning of this document are denied. The allegations in the second sentence of paragraph 46 also
4 constitute conclusions of law, to which no answer is required; to the extent they may be deemed
5 allegations of fact, they are denied.

6 47. The allegations in paragraph 47 purport to characterize the 2015 Rule and *U.S. EPA,*
7 *Connectivity of Streams and Wetland to Downstream Waters: A Review and Synthesis of the*
8 *Scientific Evidence (Final Report)*, EPA/600/R-14/475F (Washington, D.C. 2015) (2015
9 Connectivity Report), which speak for themselves and are the best evidence of their contents. Any
10 allegations contrary to the plain language and meaning of these documents are denied.

11 48. The allegations in paragraph 48 purport to characterize 82 Fed. Reg. 12,497
12 (April 25, 2017) (Executive Order 13778), which speaks for itself and is the best evidence of its
13 contents. Any allegations contrary to the plain language and meaning of this document are denied.
14 The allegations in paragraph 48 also contain conclusions of law, to which no answer is required; to
15 the extent they may be deemed allegations of fact, they are denied.

16 49. The allegations in paragraph 49 purport to characterize 84 Fed. Reg. 4,154 (Feb. 14,
17 2019) (the 2019 Rule), which speaks for itself and is the best evidence of its contents. Any
18 allegations contrary to the plain language and meaning of this document are denied.

19 **The 2020 Rule**

20 50. The allegations in paragraph 50 purport to characterize Executive Order No. 13778,
21 the 2020 Rule, the 1980s Regulations, the *SWANCC* Guidance, the *Rapanos* Guidance, the 2015
22 Rule, and the 2019 Rule, which speak for themselves and are the best evidence of their contents.
23 Any allegations contrary to the plain language and meaning of these documents are denied. The
24 allegations in paragraph 50 also constitute conclusions of law to which no answer is required; to
25 the extent they may be deemed allegations of fact, they are denied.

26 51. The allegations in paragraph 51 purport to characterize the 2020 Rule, which speaks
27 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
28 meaning of this document are denied. The allegations in Footnote 3 constitute conclusions of law

1 to which no answer is required; to the extent they may be deemed allegations of fact, they are
2 denied.

3 52. The allegations in paragraph 52 purport to characterize the 2020 Rule, which speaks
4 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
5 meaning of this document are denied.

6 53. The allegations in paragraph 53 purport to characterize the 2020 Rule, which speaks
7 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
8 meaning of this document are denied.

9 54. The allegations in paragraph 54 purport to characterize the 2020 Rule, which speaks
10 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
11 meaning of this document are denied.

12 55. The allegations in paragraph 55 purport to characterize the 2020 Rule, which speaks
13 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
14 meaning of this document are denied. The allegations in paragraph 55 also constitute conclusions
15 of law to which no answer is required; to the extent they may be deemed allegations of fact, they
16 are denied.

17 56. The allegations in paragraph 56 purport to characterize the 2020 Rule, the *Rapanos*
18 Guidance, the 2015 Rule, and the 2019 Rule, which speak for themselves and are the best evidence
19 of their contents. Any allegations contrary to the plain language and meaning of these documents
20 are denied.

21 57. The allegations in paragraph 57 purport to characterize the 2020 Rule and USACE
22 Internal Communication, September 4-5, 2017, “Breakdown of Flow Regimes in NHD Streams
23 Nationwide,” which speak for themselves and are the best evidence of their contents. Any
24 allegations contrary to the plain language and meaning of these documents are denied. The
25 allegations in paragraph 57 also constitute conclusions of law to which no answer is required; to
26 the extent they may be deemed allegations of fact, they are denied.

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1 ***The 2020 Rule's Deficiencies***

2 58. The allegations in paragraph 58 constitute conclusions of law to which no answer is
3 required; to the extent they may be deemed allegations of fact, they are denied.

4 59. The allegations in paragraph 59 purport to characterize the 2020 Rule, which speaks
5 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
6 meaning of this document are denied.

7 60. The allegations in paragraph 60 constitute conclusions of law and Plaintiffs'
8 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
9 allegations of fact, they are denied.

10 61. The allegations in paragraph 61 constitute conclusions of law and Plaintiffs'
11 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
12 allegations of fact, they are denied.

13 62. The allegations in paragraph 62 constitute conclusions of law and Plaintiffs'
14 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
15 allegations of fact, they are denied.

16 63. The allegations in paragraph 63 purport to characterize the 2015 Rule and its
17 associated record, which speak for themselves f and are the best evidence of their contents. Any
18 allegations contrary to the plain language and meaning of these documents are denied.

19 64. The allegations in paragraph 64 purport to characterize EPA's 2015 Connectivity
20 Report, which speaks for itself and is the best evidence of its contents. Any allegations contrary to
21 the plain language and meaning of this document are denied.

22 65. The allegations in paragraph 65 constitute conclusions of law and Plaintiffs'
23 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
24 allegations of fact, they are denied. Any allegations contrary to the plain language and meaning of
25 the 2020 Rule are further denied.

26 66. The allegations in paragraph 66 purport to characterize 85 Fed. Reg. at 22,261,
27 which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
28 language and meaning of this document are denied.

1 67. The allegations in paragraph 67 and Footnote 7 purport to characterize the *SAB Draft*
2 *Commentary on Proposed Final Rule* (Oct. 16, 2019) and *SAB Commentary on the Proposed Rule*
3 *Defining the Scope of Waters Federally Regulated Under the Clean Water Act* (Feb. 27, 2020),
4 which speak for themselves and are the best evidence of their contents. Any allegations contrary to
5 the plain language and meaning of these documents are denied.

6 68. The allegations in paragraph 68 purport to characterize the 2020 Rule, which speaks
7 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
8 meaning of this document are denied.

9 69. The allegations in paragraph 69 purport to characterize the 2020 Rule, which speaks
10 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
11 meaning of this document are denied. The allegations in paragraph 69 also contain conclusions of
12 law, to which no answer is required; to the extent they may be deemed allegations of fact, they are
13 denied.

14 70. The allegations in paragraph 70 constitute conclusions of law and Plaintiffs'
15 characterization of the 2020 Rule, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule, to
16 which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

17 71. The allegations in paragraph 71 constitute conclusions of law and Plaintiffs'
18 characterization of the 2020 Rule, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule, to
19 which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

20 72. The allegations in paragraph 72 constitute conclusions of law and Plaintiffs'
21 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
22 allegations of fact, they are denied.

23 73. The allegations in paragraph 73 purport to characterize the 2020 Rule and its
24 associated record, which speak for themselves and are the best evidence of their contents. Any
25 allegations contrary to the plain language and meaning of these documents are denied.

26 74. The allegations in paragraph 74 purport to characterize the 2020 Rule and its
27 preamble, which speak for themselves and are the best evidence of their contents. Any allegations
28 contrary to the plain language and meaning of these documents are denied.

THE 2020 RULE HARMS THE STATES AND CITIES

75. The allegations in paragraph 75 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

76. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 76, and on that basis deny the same. The allegations in the final sentence of paragraph 76 also contain conclusions of law to which no answer is required.

77. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 77, and on that basis deny the same.

78. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 78, and on that basis deny the same. The remaining allegations in paragraph 78 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

79. The allegations in the first and second sentences of paragraph 79 purport to characterize the 2020 Rule and the 2019 Rule, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the third and fourth sentences of paragraph 79, and on that basis deny the same. The allegations in the final sentence of paragraph 79 purport to characterize EPA and Department of the Army, *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* (Jan. 23, 2020), EPA-HQ-OW-2018-0149 (Resource and Programmatic Assessment), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

80. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 80, and on that basis deny the same. The remaining allegations in paragraph 80 purport to characterize the Agencies' Resource and Programmatic Assessment, and EPA and Department of the Army, *Economic Analysis for the Navigable Waters Protection Rule: "Definition of Waters of the United States"* (Jan 22, 2020), EPA-HQ-OW-2018-

1 0149, which speak for themselves and are the best evidence of their contents. Any allegations
2 contrary to the plain language and meaning of these documents are denied.

3 81. The allegations in paragraph 81 purport to characterize the 2020 Rule and the
4 Agencies' Resource and Programmatic Assessment, which speak for themselves and are the best
5 evidence of their contents. Any allegations contrary to the plain language and meaning of these
6 documents are denied.

7 82. The allegations in paragraph 82 purport to characterize the 2020 Rule, which speaks
8 for itself and is the best evidence of its contents. Any allegations contrary to the plain language and
9 meaning of this document are denied.

10 83. The Sacketts lack information sufficient to form a belief as to the truth of the
11 allegations in the first sentence of paragraph 83, and on that basis deny the same. The remaining
12 allegations in paragraph 83 purport to characterize the Agencies' Resource and Programmatic
13 Assessment, which speaks for itself and is the best evidence of its contents. Any allegations
14 contrary to the plain language and meaning of this document are denied.

15 84. The Sacketts lack information sufficient to form a belief as to the truth of the
16 allegations in paragraph 84, and on that basis deny the same.

17 85. The Sacketts lack information sufficient to form a belief as to the truth of the
18 allegations in paragraph 85, and on that basis deny the same.

19 86. The Sacketts lack information sufficient to form a belief as to the truth of the
20 allegations in paragraph 86, and on that basis deny the same.

21 87. The Sacketts lack information sufficient to form a belief as to the truth of the
22 allegations in paragraph 87, and on that basis deny the same.

23 88. The Sacketts lack information sufficient to form a belief as to the truth of the
24 allegations in paragraph 88, and on that basis deny the same.

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FIRST CAUSE OF ACTION

**Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law
Impermissible Interpretation of “Waters of the United States”**

89. The Sacketts’ responses to paragraphs 1 to 88 are incorporated herein by reference.

90. The allegations in paragraph 90 constitute conclusions of law and Plaintiffs’ characterization of 5 U.S.C. § 706(2)(A), to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

91. The allegations in paragraph 91 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

92. The allegations in paragraph 92 constitute conclusions of law and Plaintiffs’ characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

93. The allegations in paragraph 93 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

94. The allegations in paragraph 94 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

SECOND CAUSE OF ACTION

**Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law
Disregard of Scientific Evidence, Prior Agency
Factual Findings and Policy and Practice**

95. The Sacketts’ responses to paragraphs 1 to 94 are incorporated herein by reference.

96. The allegations in paragraph 96 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

97. The allegations in paragraph 97 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

98. The allegations in paragraph 98 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

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1 99. The allegations in paragraph 99 constitute conclusions of law and Plaintiffs’
 2 characterization of the 2020 Rule and 2015 Connectivity report, to which no answer is required; to
 3 the extent they may be deemed allegations of fact, they are denied.

4 100. The allegations in paragraph 100 constitute conclusions of law and Plaintiffs’
 5 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
 6 allegations of fact, they are denied.

7 101. The allegations in paragraph 101 constitute conclusions of law and Plaintiffs’
 8 characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed
 9 allegations of fact, they are denied.

10 102. The allegations in paragraph 102 constitute conclusions of law to which no answer
 11 is required; to the extent they may be deemed allegations of fact, they are denied.

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 13 **THIRD CAUSE OF ACTION**
 14 **Violation of the Administrative Procedure Act, 5 U.S.C. § 706**
 15 **Arbitrary and Capricious and Not in Accordance**
 with Law Failure to Consider Statutory
 Objective and Impacts on Water Quality

16 103. The Sacketts’ responses to paragraphs 1 to 102 are incorporated herein by reference.

17 104. The allegations in paragraph 104 constitute conclusions of law to which no answer
 18 is required; to the extent they may be deemed allegations of fact, they are denied.

19 105. The allegations in paragraph 105 constitute conclusions of law to which no answer
 20 is required; to the extent they may be deemed allegations of fact, they are denied.

21 106. The allegations in paragraph 106 constitute conclusions of law and Plaintiffs’
 22 characterization of 33 U.S.C. § 1251(a), to which no answer is required; to the extent they may be
 23 deemed allegations of fact, they are denied.

24 107. The allegations in paragraph 107 purport to characterize the Clean Water Act, which
 25 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
 26 language and meaning of the statute are denied. The allegations in paragraph 107 also contain
 27 conclusions of law to which no answer is required; to the extent they may be deemed allegations
 28 of fact, they are denied.

1 108. The allegations in paragraph 108 purport to characterize the Clean Water Act and
2 the 2020 Rule, which speak for themselves and are the best evidence of their contents. Any
3 allegations contrary to the plain language and meaning of these documents are denied. The
4 allegations in paragraph 108 also contain conclusions of law to which no answer is required; to the
5 extent they may be deemed allegations of fact, they are denied.

6 109. The allegations in paragraph 109 constitute conclusions of law to which no answer
7 is required; to the extent they may be deemed allegations of fact, they are denied.

8 110. The allegations in paragraph 110 purport to characterize the Clean Water Act, which
9 speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain
10 language and meaning of the statute are denied. The allegations in paragraph 110 also constitute
11 conclusions of law to which no answer is required; to the extent they may be deemed allegations
12 of fact, they are denied.

13 **PLAINTIFFS' REQUEST FOR RELIEF**

14 The remainder of Plaintiffs' Complaint consists of Plaintiffs' Request for Relief, which
15 requires no response. To the extent that a response may be deemed required, the Sacketts deny that
16 Plaintiffs are entitled to the relief requested or to any relief whatsoever.

17 **GENERAL DENIAL**

18 The Sacketts hereby deny any allegations of Plaintiffs' Complaint, whether express or
19 implied, that are not otherwise specifically admitted or qualified herein.

20 **AFFIRMATIVE DEFENSES**

21 Without admitting any of the allegations of Plaintiffs' Complaint, and without admitting or
22 acknowledging that the Sacketts have any burden to prove any of the following allegations, the
23 Sacketts allege the following as separate and independent affirmative defenses as to all claims and
24 claims for relief asserted by Plaintiffs.

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FIRST AFFIRMATIVE DEFENSE

(Commerce Clause/Tenth Amendment)

1 2. Under the Clean Water Act, the Army Corps of Engineers (Army) and
2
3 Environmental Protection Agency (EPA) may only regulate discharges to “navigable waters.” *See*
4
5 33 U.S.C. § 1344(a).

6 2. The Navigable Waters Protection Rule defines “navigable waters” to exclude
7 wetlands unless they abut other regulated waters, are flooded by other regulated waters, or are
8 separated from other regulated waters only by natural or permeable artificial barriers (collectively
9 “nonregulated wetlands”). 33 C.F.R. § 328.3(c)(1).

10 3. When enacting the Clean Water Act, Congress had in mind only its traditional
11 regulation of navigation. *SWANCC*, 531 U.S. at 172.

12 4. *SWANCC* holds that isolated ponds are outside of the scope of the term “navigable
13 waters” under the Clean Water Act, based in part on the absence of a clear statement in the Act that
14 would extend regulation to such features, and the limits that the Commerce Clause and Tenth
15 Amendment place on Congress’ regulatory power. 531 U.S. at 174.

16 5. “Nonregulated wetlands” routinely occur on private property, such as the Sacketts’,
17 that legally is or may be used for a wide variety of land uses and purposes, as an aspect of property
18 ownership and affirmed under state and local law. These uses include but are not limited to farming,
19 ranching, roads, ditches, wells, pipelines, tanks, reservoirs, ponds, windmills, power and
20 telecommunications poles and related infrastructure, fencing, livestock pens and corrals, equipment
21 and storage yards, loading facilities, parking areas, and buildings (including but not limited to barns,
22 sheds, shops, warehouses, stores, garages, and homes). All of these are traditional and customary
23 uses of real property and generally create no nuisance conditions.

24 6. Property owners such as the Sacketts routinely put their real property to most if not
25 all these uses, consistent with local and state regulation and permitting.

26 7. Many of these uses coincide with areas that contain “nonregulated wetlands,” and
27 involve non-exempt discharges of dredged or fill material to those features.

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8. Interpreting “navigable waters” in the Clean Water Act to allow regulation of the use of “nonregulated wetlands” on private property such as described in the preceding paragraph would extend federal authority to and beyond the outer reaches of the Commerce Power. The Clean Water Act contains no clear statement of Congressional intent to regulate to such extent. *SWANCC*, 531 U.S. at 174. The agencies’ interpreting of the Act in the Navigable Waters Protection Rule to exclude “nonregulated wetlands” is not an exercise of agency discretion, but instead is compelled by the Commerce Clause.

9. Interpreting “navigable waters” in the Clean Water Act to allow regulation of the use of private property such as described in paragraphs 5-7 above would intrude extensively on local land use regulation and water resource regulation and allocation. The Tenth Amendment reserves government power over these questions to the states. *SWANCC*, 531 U.S. at 173 (“This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”); *see also Rapanos*, 547 U.S. at 737-38. Clean Water Act regulation of such activities would amount to a federal veto power over local land use law, zoning, and permitting. The agencies’ interpretation of the Clean Water Act to exclude “nonregulated wetlands” is not an exercise of agency discretion, but instead is compelled by the Tenth Amendment.

SECOND AFFIRMATIVE DEFENSE

(Article I/Nondelegation Doctrine)

10. The Navigable Waters Protection Rule interprets “navigable waters” in the Clean Water Act to exclude wetlands unless they abut other regulated waters, are flooded by other regulated waters, or are separated from other regulated waters only by natural or permeable artificial barriers (collectively “nonregulated wetlands”). 33 C.F.R. § 328.3(c)(1). The Supreme Court has held that while the Clean Water Act regulates some waters that are not navigable-in-fact, it does not regulate all “waters” and that “navigable” must have some limiting meaning. *SWANCC*, 531 U.S. 171-72 (the Act regulates some waters not “deemed ‘navigable’ under the classical understanding of that term” but not all such waters) (quoting *Riverside Bayview Homes*, 474 U.S. at 133).

11. The Act does not define “navigable.” If the term does not have its ordinary meaning but instead has some broader or different meaning, then the statute unconstitutionally delegates to EPA and the Army the task of deciding, as a policy matter, what non-navigable wetlands the agencies will regulate. The agencies themselves see their work as largely one of identifying, balancing, and selecting among competing policy priorities. *See, e.g.*, 85 Fed. Reg. at 22,264, 22,270-71, 22,277, 22,290, 22,292, 22,300.

12. In making this delegation, the Clean Water Act lacks any appropriately understood “intelligible principle” and provides no guidance or criteria to the agencies to circumscribe their policy decision defining “navigable.”

13. The Act identifies no fact-finding that the agencies must engage in to define “navigable.”

14. The Act provides no factors for the agencies to consider, let alone what weight to give to any such factors, in determining the meaning of “navigable.”

15. If “navigable” in the statute means something other than “navigable-in-fact,” such that the exclusion of “nonregulated wetlands” from the definition of “navigable waters” is not compelled by the text of the Act and/or the Commerce Clause and Tenth Amendment, then the statute delegates unbounded discretion to the agencies to define the term, in violation of the non-delegation doctrine, and Article I of the Constitution (vesting “all legislative powers” in the Congress).

16. If the regulation of “non-regulated wetlands” would violate Article I and the Non-Delegation Doctrine, then the Army and EPA’s decision to exclude such “non-regulated wetlands” from the scope of the Navigable Waters Protection Rule cannot be legally invalid on any basis, nor can it be set aside or enjoined under the Administrative Procedure Act.

THIRD AFFIRMATIVE DEFENSE

(Void for Vagueness)

17. The Navigable Waters Protection Rule interprets “navigable waters” in the Clean Water Act to exclude wetlands unless they abut other regulated waters, are flooded by other

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1 regulated waters, or are separated from other regulated waters only by natural or permeable
2 artificial barriers (collectively “nonregulated wetlands”). 33 C.F.R. § 328.3(c)(1).

3 18. The Act does not define “navigable.” If the term does not have its ordinary meaning
4 but instead has some broader or different meaning, the Act gives no notice of that meaning or its
5 contours. The agencies themselves see their work as largely one of identifying, balancing, and
6 selecting among competing policy priorities, rather than elaborating a technical definition of some
7 commonly known term. *See, e.g.*, 85 Fed. Reg. at 22,264, 22,270-71, 22,277, 22,290, 22,292,
8 22,300; *see also Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring) (“the words
9 themselves are hopelessly indeterminate.”).

10 19. The Due Process Clause of the U.S. Constitution requires that criminal statutes
11 provide adequate notice of the conduct which they proscribe to those who must comply. *United*
12 *States v. Lanier*, 520 U.S. 259, 265-67 (1997). The Clean Water Act imposes criminal penalties. 33
13 U.S.C. § 1319(c).

14 20. The rule of lenity also requires that statutes with criminal penalties be interpreted in
15 the light most favorable to criminal defendants. *United States v. Granderson*, 511 U.S. 39, 54
16 (1994) (“[W]here text, structure, and history fail to establish that the Government’s position is
17 unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant’s]
18 favor.”).

19 21. If the term “navigable” in the Act does not have the ordinary meaning of
20 “navigable,” but at the same time does not encompass “all waters,” then it is impossible for any
21 regulated party to know from the statute what waters are regulated unless and until the agencies
22 give some meaning to the term.

23 22. A statute whose requirements are only knowable after they are “interpreted” by
24 enforcement officials is a classic violation of the void for vagueness doctrine. If “navigable” is
25 interpreted in a way that its meaning is unknown absent case by case agency interpretation, then
26 the statute fails to give constitutionally adequate notice of the conduct that it proscribes and is void-
27 for-vagueness under the Due Process Clause.

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23. If “navigable” as used in the Clean Water Act is void-for-vagueness, then the decision of the Army and EPA to exclude “nonregulated wetlands” from the scope of the Navigable Waters Protection Rule cannot be legally unsound under any basis, nor can it be set aside or enjoined under the Administrative Procedure Act.

RESERVATION OF DEFENSES

24. The Sacketts reserve the right to amend this Answer and to assert additional defenses.

PRAYER FOR RELIEF

Defendant-Intervenors pray that Plaintiffs take nothing by their Complaint, and that the Court award Defendant-Intervenors their costs and attorneys' fees, and any other relief the Court may deem just and proper.

DATED: May 21, 2020.

Respectfully submitted,

ANTHONY L. FRANÇOIS
CHARLES T. YATES

By /s/ Anthony L. François
ANTHONY L. FRANÇOIS

Attorneys for Defendant-Intervenors
Chantell and Michael Sackett